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8   UNITED STATES DISTRICT COURT

9   SOUTHERN DISTRICT OF CALIFORNIA

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11   JAMAL AHBAKI DAVIS,   Civil No.   12-2179 WQH (DHB)

12   Petitioner,

13   v.   **ORDER**

14   UNKNOWN, Warden

15   Respondent.

16   Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas

17   Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the $5.00 filing fee and has failed to

18   move to proceed in forma pauperis.

19   **FAILURE TO SATISFY THE FILING FEE REQUIRMENT**

20   Because this Court cannot proceed until Petitioner has either paid the $5.00 filing fee or

21   qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. <u>See</u>

22   Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit,

23   **no later than <u>December 28, 2012,</u>** a copy of this Order with the $5.00 fee or with adequate

24   proof of his inability to pay the fee.

25   **FAILURE TO NAME A PROPER RESPONDENT**

26   In addition, the case must be dismissed because Petitioner failed to name a proper

27   respondent. On federal habeas, a state prisoner must name the state officer having custody of

28   him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule

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2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. *See id.*

The warden is the typical respondent. However, "the rules following section 2254 do not specify the warden." *Id.* "[T]he 'state officer having custody' may be 'either the warden of the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.'" *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee's note). If "a petitioner is in custody due to the state action he is challenging, '[t]he named respondent shall be the state officer who has official custody of the petitioner (for example, the warden of the prison).'" *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee's note).

A long standing rule in the Ninth Circuit holds "that a petitioner may not seek [a writ of] habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The actual person who is [the] custodian [of the petitioner] must be the respondent." *Ashley v. Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of habeas corpus acts upon the custodian of the state prisoner, the person who will produce "the body" if directed to do so by the Court. "Both the warden of a California prison and the Director of Corrections for California have the power to produce the prisoner." *Ortiz-Sandoval*, 81 F.3d at 895.

Here, Petitioner has failed to name a Respondent. In order for this Court to entertain the Petition filed in this action, Petitioner must name the warden in charge of the state correctional facility in which Petitioner is presently confined or the Secretary of the California Department of Corrections and Rehabilitation. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

CONCLUSION

Accordingly, the Court **DISMISSES** the Petition without prejudice due to Petitioner's failure to satisfy the filing fee requirement and failure name a proper respondent. To have this case reopened, Petitioner must (1) either pay the filing fee or provide adequate proof of his inability to pay **and** (2) file a First Amended Petition which cures the pleading deficiency

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1 outlined in this order, **no later than December 28, 2012**. For Petitioner's convenience, the

2 Clerk of Court shall attach to this Order a blank petition form and a blank in forma pauperis

3 application.

4   **IT IS SO ORDERED.**

5 DATED: 10/5/12   _____

6   William Q. Hayes
                                               United States District Judge

7 CC: ALL PARTIES

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